No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellee.

Appeal From the United States District Court, Southern District of California, Central Division.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdiction of District Court.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered April 29, 1953.

Jurisdiction of the action in the District Court was founded upon Title 28, U. S. Code, Section 1338(a), providing for original jurisdiction in the United States District Court of any civil action arising under any Act of Congress relating to copyrights. The declaratory judgment was authorized by Section 2201 of Title 28, U. S. Code, as it involved an interpretation by the court of Section 24, Title 17, U. S. Code, relating to extensions and renewals of copyrights.

II.

Jurisdiction of the United States Court of Appeals.

This Honorable Court has jurisdiction to review the judgment rendered by the District Court under the provisions of 28 U. S. C. A., Sections 1291 and 1294.

III.

Statement of the Case.

George G. DeSylva, who died July 11, 1950, was an author and composer of musical works, many of which were copyrighted during the last 28 years of his life, and was the owner or part owner of said copyrights. Since his death, a number of copyrights were renewed in the name of Marie DeSylva, his widow and appellee herein. Other copyrights will, in the future, come up for renewal.

Marie Ballentine, as the mother and guardian of the estate of Stephen William Ballentine, appellant herein, filed a complaint in the District Court on August 8, 1952, contending that as the son of George G. DeSylva, Stephen William Ballentine was equally entitled with Marie DeSylva, widow of George G. DeSylva, to the renewals and

extensions of said copyrights and prayed for a declaratory judgment and for an accounting.

Appellee, on January 7, 1953, filed her answer herein, contending that in accordance with the provisions of Section 24, Title 17, U. S. Code, relating to the extensions and renewals of copyrights, she, as the widow of George G. DeSylva, is the sole owner of the renewals and extensions of all copyrights in which George G. DeSylva, deceased, had an interest, and further contended that the said Stephen William Ballentine is not a child of the deceased, George G. DeSylva, within the meaning of Section 24, Title 17, U. S. Code, and prayed for a declaration of the rights and duties of the respective parties and for a declaration that she is the sole owner of said renewals and extensions of copyrights.

Motions were made by both parties for summary judgment.

It was stipulated between the parties that Stephen William Ballentine is the son of George G. DeSylva, deceased, and of Marie Ballentine, and also that the said George G. DeSylva and Marie Ballentine were not married at the time of the birth of Stephen William Ballentine, or at any other time.

In a judgment entered April 29, 1953, the District Court held that in accordance with Section 24, Title 17, U. S. Code, so long as appellee Marie DeSylva is alive, she as the widow of George G. DeSylva, is the sole owner of all rights to renewals and extensions of all copyrights in which George G. DeSylva had an interest and that appellant has no present right to an accounting nor will have any right to an acounting so long as Marie DeSylva is alive.

Question Presented.

On the death of the author of a copyrighted work, under Section 24, Title 17, U. S. Code, does the widow alone have the right of renewal, or do the widow and children share such right as a class?

The pertinent portion of Section 23, Title 17, U. S. Code, providing for the renewal of copyrights, reads as follows:

> "That * * *, the author of such work, if still living, or the widow, widower, *or* children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright * * *." (Emphasis ours.)

In spite of the plain language of the statute, appellant's contention is that the word "or" does not mean "or," but means "and." It is submitted, however, that such a contention is untenable, inasmuch as the courts have, in a long line of cases, taken the position that in statutory construction the word "or" is to be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statute. See:

In re Rice (U. S. C. A., D. C., 1947), 162 F. 2d 617, 619;

Travers v. Reinhardt, 205 U. S. 423, 430, 51 L. Ed. 865, 869;

Gay Union Co. v. Wallace, 71 App. D. C. 382, 387, 112 F. 2d 192, 197, cert. den., 310 U. S. 647;

International Mercantile Marine Co. v. Lowe (2d Cir., 1938), 93 F. 2d 663, 665;

In re 188 Randolph Building Corp. (7th Cir., 1945), 151 F. 2d 357, 358;

Adolfson v. U. S. (9th Cir., 1947), 159 F. 2d 883, 886 (cert. den., 67 S. Ct. 1307).

In the *Travers v. Reinhardt* case, Justice Harlan Stone refused to declare that the word "or" as used in a codicil to a will in much the same circumstances as the term is used here meant "and."

A simple reading of Section 24, Title 17, and all other sections of the Copyright Act dealing with the right of renewal quickly discloses that there is nothing therein which would make any portion of the act repugnant to any other portion if the normal disjunctive meaning of the word "or" is used as has been done in the numerous cases cited above.

While there have been no federal cases construing the meaning of "or" under Section 24, Title 17, U. S. Code, the meaning of the statute is clear and no reason appears why the word "or" should not be given its ordinary disjunctive meaning. It is submitted that the usual statutory interpretation of the word "or" in its disjunctive sense has been accepted by the federal courts in at least two copyright cases, by the Attorney General of the United States in an opinion rendered in 1910, shortly after the passage of the Act, and by numerous texts and other legal treatises.

Counsel for appellant assumes that inasmuch as the statute could have been written in such a manner that there would be no question as to its intent, the statute is, therefore, ambiguous or uncertain. From there they proceed to the theory that inasmuch as there are good rea-

sons why the children, as well as the widow, are the natural object of the author's bounty, Congress must necessarily have intended that the widow and children should take as a class, and that therefore the Act should read "the widow, widower *and* children" are entitled to the right of renewal.

This argument patently begs the question, "Do the words 'widow, widower or children' designate alternatives or a class?" To argue that Congress should have placed the children in the same class with the widow and that therefore the statute is ambiguous is to ignore the plain wording of the statute.

It is submitted that the assumption of ambiguity or uncertainty on the basis of what Congress should have done is no argument at all. Simply because the court is here required to construe the statute does not mean that the statute is ambiguous or uncertain. The most that can be said in this direction is that no court has had occasion to interpret the statute on this point.

Counsel for appellant apparently rely almost exclusively for their arguments upon the personal letter written by George D. Carey, of the Patent Office in answer to a query from appellant's counsel. The conclusions of Mr. Carey are unsupported by any reference whatsoever. On the other hand, appellee submits that numerous authorities take the view that the persons named in Section 24 take in the order in which they are enumerated and that necessarily the widow or widower take to the exclusion of a child or children, and in this connection, cites the following authorities:

In 18 C. J. S., page 204, the following language is used:

> "In all other cases, the right of renewal of such subsisting copyrights was in the author, if living,

or in the author's widow, widower, children, executors, or next of kin, *in the order stated,* if the author be dead." (Emphasis ours.)

Reference is made to 13 C. J., page 1090, in which the following language is used:

"* * * if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin are entitled *in the order named* to the renewal or extension of the copyright." (Emphasis ours.)

Again, on the same page, the following language is used:

"In all other cases the right of renewal of such subsisting copyrights is in the author, if living, or in the author's widow, widower, children, executors, or next of kin *in the order stated,* if the author be dead." (Emphasis ours.)

34 Am. Jur., page 423, uses the following language:

"The author of such work, if living, is entitled to the extension. If he is not living, the right exists in the author's widow, widower, or children if there is such, otherwise the extension may be secured by the author's executors, or, in the absence of a will, to his next of kin. In any case, however, an application for such renewal and extension must be made to the copyright office and duly registered therein, within one year prior to the expiration of the original term of the copyright. The purpose of the renewal provision in the copyright statute is to give to the persons enumerated *in the order of enumeration* a new right or estate not growing legally out of the original copyright property, but a new creation for

the benefit, if the author is dead, of those naturally dependent upon, or properly expectant of, the author's bounty." (Emphasis ours.)

It will be noted that all these texts specifically state that they are to take in the order named, and among the authorities cited for this statement is the case of *White-Smith Music Publishing Co. v. Goff* (1st Cir., 1911), 187 Fed. 247. While that case does not deal directly with the question of the right of renewal as between a widow and a child or children, the case has nevertheless been interpreted by legal students as generally holding that the widow is entitled to the right to the exclusion of the children. The opinion is a lengthy one, and while most of the language therein is interesting, it is too long to report in full. This right of renewal was held to be a new right created by Congress and by inference the person who takes on the death of the author is the widow. At page 249, the court used the following language:

> "* * * Indeed, whether the position of the complainant or the respondents be correct, the word 'proprietor' comes in legitimately because, in connection with the renewal, the persons who control the right thereto, whether widow, widower, or the author himself, may, during the year prior to the expiration of the existing term nominated in section 24, assign the right to renewal, so that the then proprietor may make the new registration required and take out the extension in his own name. * * *"

Again, at page 250, the court stated:

> "This did in truth assume to vest the new right in the widow, etc., if the author was not living, and cut out mere proprietor by omitting his name."

Shortly after the enactment of Section 24 by the Act of 1909, a lengthy opinion was handed down by Assistant Attorney General Fowler, found in Volume 28, Opinions of the Attorney General, page 162, and after quoting the provisions of Sections 23 and 24 of the Act, he uses the following language (pp. 164-5):

> "Each of these sections is specific in its terms, and leaves but little or no room for construction. In the first it is expressly provided that the assigns of an author or proprietor shall have a copyright for the work upon complying with the conditions specified in the act. In the second it is provided that if the work be posthumous or composite upon which the original copyright was secured by the proprietor, or if copyrighted by a corporate body otherwise than as assignee or licensee of the individual, or by an employer for whom such work is made for hire, the proprietor may procure the renewal, but that in all other cases it must be procured by the author, if living, or if dead, by the widow, widower, or children, or if they also be dead, by the author's executors, if there be a will, or otherwise by his next of kin; and the third section mentioned, the one here applicable, requires the extension or renewal to be procured by the author, if living, or if dead, *by the persons and in the order mentioned in the preceding section,* except as to composite works which were originally copyrighted by the proprietor, in which case the proprietor may secure the extension.
>
> "The very fact that each of these sections enumerates with such particularity the persons who may exercise the privilege of securing copyrights and having them renewed and the order in which the right vests, and that in these particulars the sections materially differ from each other, shows that the persons enumerated are exclusive of all others and that it

was not the purpose of Congress to confer the right upon any person or persons not therein specifically mentioned." (Emphasis ours.)

One of the most interesting cases dealing with the question is that of *Silverman v. Sunrise Pictures Corp.* (2nd Cir., 1921), 273 Fed. 909. In that case, Augusta E. Wilson was the author of "At the Mercy of Tiberius," and had obtained a copyright thereon which expired on October 12, 1915. She died testate in 1909, leaving no husband, children or descendants of children, and by her will devised all copyrights, etc., to her brothers, sisters and their issue. Her estate was probated and the executors discharged in 1911. Within the time allowed for renewal of copyright, two sisters filed an application for renewal as next of kin and plaintiff as the assignee of the next of kin sought an injunction against the defendants for using the book for making a motion picture. The District Court denied the injunction but Judge Hough, in writing the opinion for the United States Court, at page 911, used the following language:

"We cannot discover that what may be called the renewal provisions of the present act have received judicial consideration other than that of *White, etc., Co. v. Goff, supra,* affirming the opinion of Brown, District Judge, in (D. C.) 180 Fed. 256. These cases very closely follow the reasoning and conclusion of Assistant Attorney General Fowler (28 Op. Attys. Gen. 162) rendered shortly before the judgment of the appellate court.

"On this authority, as well as, the reason of the matter, we regard it as settled: (1) that the proprietor of an existing copyright as such as no right to a renewal. (2) There is nothing in *Page v. Banks,* 13 Wall. 608, 20 L. Ed. 709, opposed to this

ruling. (3) The statute confers no right of renewal upon administrators. (4) The purpose of the statutory renewal provisions is to give to the persons enumerated *in the order of their enumeration* a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty." (Emphasis ours.)

Here, again, is the same interpretation placed upon the intent of Congress as to the right of renewal as that adopted by Corpus Juris, Corpus Juris Secundum, American Jurisprudence, and the Attorney General, and the same interpretation applied to the opinion in *White-Smith Music Publishing Co. v. Goff* as that of the others, and in the opinion of Judge Hough, it is settled that the right of renewal is in the persons enumerated in Section 24 in the order in which they are named.

To the same effect is *Fox Film Corp. v. Knowles,* 274 Fed. 731.

We have endeavored to check all available legal treatises, etc., on the subject. Many of these works are satisfied simply to quote the statute without comment. With the exception of Tannenbaum in his treatise on Practical Problems in Copyright, C. C. H. Law Handybook, 7 Copyright Problems Analyzed (1952), all who have seen fit to discuss the specific question here at issue make the statement that the right of renewal passes to the persons enumerated in Section 24 in the order in which mentioned. We think quotations from some of these works might be of interest to the court.

The following works, without our attempting to quote the exact language, make the statement that the right of

renewal of a copyright passes to the author, if living, and if the author be not living, to his widow, or the widower, the author's children, or if they be dead, to his executors or next of kin, and in the order named. See:

Law of Copyright and Literary Property, Horace G. Ball, 1944, page 201;

Copyright Law, Weil, 1917, page 365;

How to Secure Copyright, Richard Wincor, 1950, pages 10 and 45;

The Copyright Law, Howell (formerly Assistant Register of Copyrights), 1952, 3rd Edition, page 109.

In three works on Copyright, the authors go into this specific question in detail.

In *A Manual of Copyright Practice,* by Margaret Nicholson (1945), at pages 195-6, in discussing this subject, or questions relating thereto, the following questions are asked and answers given:

"The publisher is assigned copyright of an author. Author dies and copyright is about to expire. Publisher wishes to renew copyright. The understanding is that he can't. Copyright must be renewed by author's heirs. Am I correct?

"No. The publisher may renew the copyright in the name of the widow or widower, if there is one; of the child or children, if there is no widow or widower; of the next of kin, if the author died intestate; of the executor, if the author is recently dead and the estate is not settled. He cannot renew it in his own name, and his renewal of it in the name of any of the persons listed above gives him no power over it without direct permission from that person. But it saves the copyright."

Page 197:

"The law says if an author is dead, the renewal must be obtained by his wife, or his heirs, or the executor named in his will. If the wife also dies, should the renewal be obtained by her executor or the executor in the author's will (presuming there are different executors, of course)?

"The Copyright Act stipulates that if an author is dead the renewal may be made by

I. His widow. If there is no widow, by
II. His child. If there are no children, by
III. The author's executor. If he died intestate, by
IV. The author's next of kin."

In another work, *An Outline of Copyright Law* by DeWolf (1925), at pages 65-6, we find the following language:

"The renewal can only be obtained by the beneficiaries expressly named in the law, and by them in the order named, *i. e.,* the person having the first right is the author, if living, at the end of the original term; if he is not living, then the widow or widower, is entitled to renew; if there is no widow or widower, the children come in; in their absence, the executor of the author's will; and finally in the absence of all other beneficiaries and the intestacy of the author, the author's next of kin are entitled to renewal.

"If there are several children who are entitled to take the renewal copyright, it seems they take it as tenants in common, * * *."

In still another text *Risks and Rights in Publishing, Television, Radio, Etc.* by Samuel Spring (1952), the

author in discussing the right of renewal of copyright, at page 94, used the following language:

> "* * * (Section 24 C. S.) The succession of these successive classes of holders to the exclusive right to renew is rigidly enforced. Each holder succeeds to his right of renewal in strict order of priority. Thus an author's children cannot renew the term if the author's 'widow be living'; his executor cannot renew if his children (the widow being dead) are living. * * *"

With respect to appellant's contention that the copyright office accepts renewal registrations from the widow and the children regardless of whether the widow is alive or not, it is elementary that the copyright office will accept registrations from any person listed in the statute without purporting to pass thereby on the validity of such registration or the rights flowing therefrom. As the Attorney General stated in his opinion published in 28 Official Opinions of Attorney General of United States (1912), pages 162, at 166:

> "When the application for renewal is presented to the Register of Copyrights, the only thing left for his consideration is whether the applicant is one of the persons designated in the statute; but who can possess the legal or equitable right after renewal is another question. * * *."

See also *De Wolf's An Outline of Copyright Law* (1925), page 68, where the author says:

> "So far as the copyright is concerned, the renewal will be registered in the name of any beneficiary named in the law. In the event of conflicting applications, no doubt registrations would be made, leaving the parties to settle their rights in court."

From the foregoing citations, it is quite clear that the courts, the Attorney General, and all legal writers on the subject, with the exception of Mr. Tannenbaum, *supra,* are of the opinion that Congress intended, by Section 24, Title 17, U. S. Code, that the widow, if living, should take to the exclusion of a child or children.

In opposition thereto, appellant is compelled to rely upon the letter from Mr. Carey, of the Patent Office, and Mr. Tannenbaum for their proposition that Congress intended that the widow and children take as a class. Mr. Carey makes the statement that the fact that an earlier draft of the bill which specifically provided that the widow should take if she survived was dropped in favor of the present reading, indicates that it could have been the intention of Congress to group the widow and children together.

In answer to this contention, it would appear more logical to assume that Congress intended that the widow take to the exclusion of the children, and that the act was worded in its present form because undoubtedly the problem was considered. It must be assumed that Congress was familiar with the fact that the word "or" had been construed by the courts in its normal disjunctive sense unless repugnant to other provisions of the statute. Knowing that Congress did consider this question by reason of the change, is it reasonable to assume that Congress, with its knowledge of the ordinary meaning of the word "or" would have used that word instead of the word "and"? It would also seem probable that had Congress intended that the widow and children take as a class, the Congressional notes would have indicated that the act was rewritten for that purpose.

Appellant's brief is prefaced upon the assumption that since the child or children, as well as the widow or widower, would be the natural objects of an author's bounty, in all cases Congress must have intended that a child or the children should share with the widow or widower, and that they share as a class. In so doing, counsel for appellant overlooks the fact that in many instances Congress has specifically provided that the widow should take in preference to the children, and that the children take, and then share and share alike, if the widow is dead. In this connection, see:

Payments to Veterans' Dependents, Section 661, Title 38, U. S. Code;

Homestead rights, Sections 164 and 171, Title 43, U. S. Code.

That Congress intended that the word "or" should be used in its normal disjunctive meaning becomes more apparent when we consider the problems that would arise if we assume that the widow and children take as a class; for example: If only one child and the widow survive, it would be natural to assume that they take, share and share alike; however, if two children and the widow survive, the problem arises, did Congress intend that the widow take one-third or one-half? And the problem becomes difficult indeed if a widow and ten children survive.

Inasmuch as the trial court, and in our opinion, properly, ruled the widow alone is entitled to the right of renewal, we submit that it is academic that the court must necessarily have concluded that the appellant was not entitled to an accounting. Under the circumstances, it is submitted that appellant's second allegation of error must necessarily fall and is not a proper issue in this appeal.

Conclusion.

In summary, it is submitted that any construction of Section 24, Title 17, U. S. Code, interpreting the word "or" to mean "and" tortures the plain meaning of the word and is in conflict with all of the decisions of the courts and with the intent of Congress. Accordingly, the judgment of the trial court finding that the appellee, as the widow, is the sole owner of any copyright renewals during her lifetime, should be affirmed.

Respectfully submitted,

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